Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of)
Exclusive Service Contracts for Provision of)
Video Services in Multiple Dwelling Units and) MB Docket No. 07-51
Other Real Estate Developments)
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COMMENTS OF THE GREENFIELD SERVICE PROVIDER COALITION

In its *Notice of Proposed Rule Making*, the Federal Communications Commission ("FCC") seeks comments regarding the use of exclusive service contracts for provision of video services in multiple dwelling units ("MDUs") and other real estate developments. Specifically, the FCC seeks comments regarding "whether the use of exclusive contracts in the MDU [and the other real estate development] video provider market unreasonably impedes the achievement of the interrelated federal goals of enhanced multichannel video competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem."[1]

Based on the experiences of its members, the Greenfield Service Provider Coalition ("GSPC" found at www.greenfieldcoalition.com) believes that the use of

[1] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, MB Docket No. 07-51 (rel. March 27, 2007).

exclusive contracts by new competitive entrants in the MDU and related real estate markets *does not* impede or otherwise frustrate the federal goals of enhanced multichannel video competition and accelerated broadband deployment. Indeed, the GSPC believes that exclusive contracts, especially when used by new competitive entrants in greenfield residential development settings, actually enhance competition and broadband deployment. Accordingly, the GSPC contends that the FCC does not need to take any action limiting, restricting or regulating the use of exclusive contracts.

I. BACKGROUND

A. Members of the Greenfield Service Provider Coalition.

The GSPC is a group of small companies that provide, among other things, multichannel video programming services to residences and businesses over state-of-the-art fiber optic networks. GSPC members are true Fiber-To-The-Home ("FTTH") providers that deliver video programming to homes and businesses in several states. GSPC members are new competitive entrants in the video provider market and are some of the remaining few viable competitors against incumbent video providers such as cable operators and RBOCs. GSPC members include Broadweave Networks, Greenfield Communications, Inc., ICS-Intelligent Community Services, Inc., Road 9, Inc., and 180 Connect.

B. Greenfield FTTH Business Model.

1. Overview.

All GSPC members utilize, to some degree, a greenfield[2] FTTH business model. This model is built around the simple question, "why build today's cities on yesterday's infrastructure?" Under this model, new competitive entrants build and operate state-of-the-art fiber optic networks in greenfield developments. They install these networks during initial construction of greenfield developments and coordinate design, engineering and construction with greenfield developers. To recoup the substantial upfront costs associated with this type of build, new competitive entrants enter into exclusive agreements or other contractual relationships with greenfield developers or home owners associations to secure future revenue streams from future subscribers.

The greenfield FTTH business model has been successfully used by new competitive entrants since the late 1990s. At that time, greenfield developers began to use enhanced amenities, such as state-of-the-art telecommunication networks, to differentiate their developments in the eyes of consumers. Initially, they tried to work with incumbent providers to secure next generation telecommunication networks, but incumbent providers proved unresponsive and inattentive. The incumbent providers did not see the value proposition that greenfield developers were trying to create and treated developers as obstacles in their path to end users.

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[2] In the context of these comments, "greenfield" means a large real estate development that is built on land that has not been previously developed. Greenfield developments are usually master planned communities.

Given the failure of incumbent providers to meet market demand, new competitive entrants began to work with greenfield developers to provide FTTH solutions. Quickly these new entrants gained ground against incumbent providers and won contract after contract with greenfield developers. Now the greenfield FTTH business model is one of the few forms of legitimate competition against the major cable operators and RBOCs. Presently, over 80 greenfield developments, constituting approximately 6.1% of the overall FTTH market, have FTTH networks built and operated by new competitive entrants.[3] The forecast for greenfield FTTH developments is optimistic with approximately 60% of greenfield developers indicating that they plan to install FTTH networks in their developments.[4]

2. The Networks.

One important point about the greenfield FTTH business model that cannot be overstated is the type of network that new competitive entrants construct. New competitive entrants install fiber-optic networks to the home. They do not build copper networks or copper-fiber hybrids. They are true FTTH networks. These future-proof networks employ the latest technology and support the exact advanced services that the FCC seeks to foster. They allow new competitive entrants to offer consumers bandwidth up to 1,000 times the speed of traditional telephone and cable networks and to provide consumers a full suite of "triple play" services including voice, video and data.

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[3] RVA LLC, *Fiber to the Home: Advance Broadband 2006*, 62 (October 2006).

[4] *Id.* at 132.

3. Consumer Benefits.

The greenfield FTTH business model provides substantial benefits to consumers when compared to incumbent provider services. Because FTTH networks are installed during initial construction of developments and employ the latest technologies, new competitive entrants can provide better quality services at higher speeds and lower prices than incumbent providers. Indeed, some new competitive entrants contractually guarantee that their services will be faster, better, and less expensive than incumbent provider services. Generally, prices of services in greenfield developments served by new competitive entrants are less than other providers and often spur incumbent providers to lower their prices.[5] Also customer satisfaction is higher among FTTH user than other internet and non-FTTH "triple play" services.[6]

4. Unique Costs.

New competitive entrants that follow the greenfield FTTH business model incur different upfront capital costs than incumbent providers. These unique costs occur because new competitive entrants do not have existing plant and infrastructure to leverage in a greenfield build-out. They cannot simply extend their existing lines into new greenfield developments. Rather, they must build new networks from scratch.

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[5] *Id.* at 106-07.

[6] *Id.* at 87-90.

Some of the unique costs that new competitive entrants must bear are building video headends and central offices in each greenfield development including laying fiber connections from headend facilities to incumbent carriers, installing earth station satellite dishes to receive content from satellite transport providers, purchasing satellite downlink equipment, installing video encoding and distribution equipment, buying class five switching equipment, installing core routing and switching equipment, setting up back office systems, placing local personnel and support staff in every greenfield community, and creating other local processes and functions. Pictures of a typical headend and central office building that new competitive entrants must construct, including an earth station satellite dish, are attached as Exhibit A. These additional expenses – expenses not necessarily incurred by incumbent providers – are costly and easily run into the millions of dollars.

4. Key to the Greenfield FTTH Model.

The key to the competitive success and financial viability of the greenfield FTTH business model is recovering the heavy upfront capital investment, including the unique upfront capital costs only incurred by new competitive entrants, necessary to build FTTH networks and provide "triple play" services to new communities. Unless new competitive entrants have a reliable and predictable way to recoup their upfront costs they cannot enter or operate in the market. Also, new competitive entrants, more so than incumbent providers, need flexibility and financial breathing space due to their unique costs. Exclusive agreements provide this flexibility and financial breathing room. Without exclusive agreements and the assurance of future revenue that they provide, new entrants are essentially precluded from entering the video provider market because they do not have a predictable way of recouping their upfront capital outlays. The financial risks of entering the market is simply too great. The economics do not work. Thus, exclusive agreements or other contractual arrangements are the key to the greenfield FTTH business model.

II. ARGUMENT

A. Exclusive Agreements Foster Competition.

Exclusive agreements in MDUs and other real estate developments foster competition in the video marketplace for the simple reason that they allow small innovative companies like the members of the GSPC to enter the market. New competitive entrants face a very different marketplace than when incumbents entered the market. Unlike the incumbents' entry into the market, new competitive entrants do not enjoy monopolistic protection and the accompanying predictable revenue streams.[7] Also, as mentioned above, true FTTH providers that create state-of-the-art fiber networks from the ground-up face significant costs and capital expenditure before they are able to serve their first customer. They must construct multi-million dollar video headends and install other infrastructure equipment.

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[7] *See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 ¶ 87-88 (March 5, 2007) ("*Franchising Reform Order*") ("Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable providers were frequently awarded community-wide monopolies. . . . By contrast new cable entrants must compete with entrenched cable operators and other video service providers.").

Their costs are higher than most incumbent cable operators and RBOCs. To enter the market they need assurances that they can recoup their upfront costs. Exclusive contracts provide this assurance. Accordingly, exclusive contracts facilitate new entrants and competition. They essentially remove a significant barrier to entry to the video marketplace. Without excusive agreements potential new competitive entrants would not enter the market and the market would only be served by entrenched incumbents like large cable operators and RBOCs. Thus, rather than restricting competition, exclusive agreements actually promote competition and entry into the marketplace. The FCC, therefore, should not prohibit or otherwise regulate exclusive agreements.

B. Prohibiting Exclusive Agreements Would Unfairly Prejudice New Competitive Entrants.

In addition to exclusive agreements fostering competition, another reason the FCC should refrain from regulating exclusive agreements is because any regulation (unless only applied to incumbent providers) will have a disproportionally negative effect on new competitive entrants. In other words, any regulation of exclusive agreements will harm new competitive entrants more than incumbent providers and will further skew the already unlevel playing field of wireline competition. This imbalance of harm is due to the inherent differences between new competitive entrants and incumbent providers and the associated reliance on exclusive agreements that this imbalance necessitates.

1. New Competitive Entrants Face Unique and Burdensome Upfront Capital Costs.

As detailed above, new competitive entrants entering greenfield developments incur costs – costs that easily reach several million dollars – which incumbents do not. The cost structure disparity between new competitive entrants and incumbent providers means that new competitive entrants assume more financial risk on a per subscriber or per community basis than incumbent providers. To enter the market and compete on a level playing field with incumbent providers, new competitive entrants need methods like exclusive agreements to lower their risk to a level more in line with the risks incumbent providers face. New competitive entrants, therefore, rely more heavily on exclusive agreements than incumbent providers.

If the FCC were to eliminate exclusive agreements, new competitive entrants would not be able to bring their financial risk down to a level comparable to the incumbents. They would face a competitive disadvantage against the incumbent providers. They would be unable to compete with incumbent providers that have multi-billion dollar revenue streams and installed networks built over many years of monopolistic privilege. They would be forced to leave the market. They would be severely harmed and prejudiced, more so than incumbent providers that do not rely as heavily on exclusive agreements. In this way they would be disproportionally harmed by the regulation of exclusive agreements.

2. New Competitive Entrants Have Limited Market Power and Few Financially Viable "Triple Play" Business Models.

Entrenched incumbent providers have the ability to leverage their costs across their entire market base – a market base exponentially larger than the market base of new competitive entrants. New competitive entrants must find a return on investment by serving a small portion of the market.[8] Entrenched incumbent providers possess vast, cash-rich networks that generate revenue to capitalize expansion within existing markets. New competitive entrants enter the market with zero footprints and zero revenues to fund expansion into new greenfield developments. Entrenched incumbent providers are well known and enjoy high brand recognition due largely in part to being the monopolistic provider for over thirty years. New competitive entrants are unknown and lack brand recognition. In short, new competitive entrants do not enjoy nearly the same amount of market power that incumbent providers posses.

New competitive entrants also are limited in the ways that they can enter the market. Of the three potentially viable business models – overbuild, UNE and greenfield – only greenfield developments have had any significant measure of success for new competitive entrants. New competitive entrant overbuild has proved to be economically unsound. Indeed, several years ago many companies tried to compete with incumbent providers by laying FTTH networks over pre-existing incumbent networks. These overbuilders believed that they could recoup

[8] *Id.* at ¶ 88 ("A competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market.").

their upfront capital costs by quickly winning customers from incumbent providers. Their primary selling point was price. These overbuild companies, however, severely underestimated their customer acquisition costs. They did not realize the extent of the incumbent providers' market power and how much it would cost to win customers. Simply offering a lower price did not cause the customers to switch at a rate sufficient to sustain the overbuilders. Consequently, the overbuild market failed and now the competitive landscape is littered with overbuild companies that have gone out of business or filed for bankruptcy. Some of these companies include WinFirst (Bankruptcy 2002), RCN (Bankruptcy 2004), Knology (Bankruptcy 2002), Everest Connections, Altrio, and TOTALink.[9] As NCTA President Robert Sachs succinctly summarized,

> [O]verbuilders simply underestimated the extent to which the marketplace they chose to enter was already fiercely competitive . . . To entice customers away from the incumbent, they might have to charge lower prices than the incumbent. But those lower prices were insufficient to cover their costs and investment risk and were economically unsustainable for more than an introductory period.
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> The overbuild landscape is populated with . . . failed or failing companies.[10]

Similarly, the UNE business model is unworkable. Delivering video services over RBOC unbundled copper loops is technologically infeasible. RBOC copper

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[9] Testimony of Robert Sachs, President and Chief Executive Officer, National Cable & Telecommunications Association on Competition and Overbuilds in the Video Market, *Cable Competition – Increasing Price, Increasing Value?* Hearing of the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (Feb. 11, 2004).

[10] *Id.*

loops cannot support multichannel video services. This is why RBOCs are working to upgrade their legacy networks with fiber optics. While RBOCs are now investing in fiber loops, thereby making it possible on a strictly technical basis for new competitive entrants to deliver video services over their unbundled fiber network, access to these loops is unavailable due to FCC rules and court decisions. Therefore, delivering video services over RBOC fiber networks is impossible due to the current regulatory situation.

Furthermore, as RBOCs scale their fiber optic deployments, the clock ticks on the copper based UNE business model, leaving CLECs and competition in general with relatively few options. This is especially true considering the painfully obvious fact that wireless networks cannot support "triple play" services and cannot compete with fiber in either quality or quantity of services. Mobility may confer a great value to the market, but it will not be a realistic form of "triple play" competition any time in the near future.[11]

Given that the overbuild and UNE business models do not present a financially, technically, or legally viable option for delivering "triple play" residential services, the only remaining method of market entry for new competitive entrants is the greenfield FTTH model. This model represents the last hope for "triple play" competition and the last cracks in the market not already owned and controlled by the incumbent providers.

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[11] RVA LLC, *Fiber to the Home: Advanced Broadband 2006*, 11, 22-25 (October 2006).

In light of the limited market power of new competitive entrants and the lack of alternative methods to enter the market, the success of the greenfield FTTH model is extremely important for the future of competition. Accordingly, tools like exclusive agreements that help new competitive entrants equalize market power and further the success of the greenfield FTTH business model should be allowed and encouraged. The FCC should not regulate exclusive agreements because doing so would leave new competitive entrants at a competitive disadvantage with nowhere to turn for relief.

3. New Competitive Entrants Face a Marketplace That Exhibits Signs of Hyper Competition.

As mentioned above, incumbent providers enjoy strong brand recognition cultivated over many years as a monopolistic provider. To compete, new competitive entrants must offer value propositions that greenfield developers and end users find compelling and that not only beat incumbent providers but are significant enough to overcome the inherent bias of developers and consumers to select incumbents. To accomplish this, new competitive entrants are often forced to make concessions and extend offers that only arise in hyper-competitive markets. For example, some new competitive entrants have resigned themselves to the simple fact that to compete they must offer new greenfield developers a guaranteed 10% discount below similar services from incumbent providers. These new competitive entrants extend their guarantees over the life of their agreements with the developer or home owner association to keep prices constantly in flux and up to date with competitive market forces. Some new competitive entrants also offer new communities a technology value that incumbent providers have not been able to match: the deployment of a completely standards-based network that offers future-proof, vendor-neutral flexibility. Verizon, AT&T, and Qwest cannot offer the same standards-based interoperability with their proprietary PON networks—networks that do not support standards-based, multi-vendor interoperability even amongst themselves as a class of RBOCs. A standards-based, future-proof network carries higher up-front and higher variable costs, but also offers a more advantageous solution to a new greenfield development seeking future-proof sustainability over the many years to construct the development. Some new competitive entrants also offer television channels dedicated specifically to the communities they serve including channels for user-created content. They also provide free wireless hotspots, and networks that race up to 1,000 times the speed of traditional cable and telephone networks (up to 1 Gbps dedicated to each home).

Why do these new competitive entrants offer these incentives? Is it by government mandate or regulatory controls? No. They offer these advantages in order to compete with incumbent providers and win greenfield development agreements. This behavior demonstrates that competition is alive and well in the greenfield development space and that competition flourishes because of exclusive agreements. Regulating exclusive agreements will ruin the consumer benefits of competitive pricing and consign developers and homeowners to one choice in video service providers – the incumbent provider.

C. Exclusive Agreements *Do Not* Impede Competition or Harm Consumers.

1. The Greenfield Development Market, While Significant, Is Still Relatively Small and Therefore the Use of Exclusive Agreements In the Greenfield Development Market is Not Anti-Competitive.

Although exclusive contracts by their very nature allow one service provider in a MDU or other real estate development, the impact of one MDU or real estate development is relatively small compared with the overall market. In the United States approximately 1.2% of the households are FTTH subscribers.[12] As of March 2007, approximately 1,335,600 homes were connected to a FTTH network.[13] Greenfield FTTH deployment constitutes only 23% of the total FTTH construction taking place.[14] And, of the total FTTH deployment, new competitive entrants similar to members of the GSPC account for only 6.1% of the FTTH deployment.[15] Indeed, GPSC members serve a relatively small portion of the markets in which they operate. By size alone, exclusive contracts cannot be viewed as anti-competition.

2. New Competitive Entrants Must Bid on Greenfield Developments Which Evidences a Competitive Marketplace.

The process by which exclusive agreements are entered into is highly competitive. Most greenfield developers employ an open competitive bidding

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[12] RVA LLC, *FTTH/FTTP Update* (April 1, 2007).

[13] *Id.*

[14] RVA LLC, *Fiber to the Home: Advanced Broadband 2006*, 60 (October 2006).

[15] *Id.* at 62.

process – the hallmark of a properly functioning free market – to determine their telecommunications partner. This means that new competitive entrants submit competitive bids to greenfield developers and demonstrate that their services meet all legal and technical requirements, and are innovative, tested, reliable, and attractive to consumers. Developers then scrutinize each bid and select the provider that he/she believes will best serve the community and make the development attractive to potential homebuyers. This competitive bidding process usually includes four to five potential providers including incumbent cable operators and RBOCs. It is fiercely competitive with potential video providers jockeying to create the best package with the greatest benefit to consumers at the lowest price. For example, one new competitive entrant recently entered into a nationwide competitive bidding process for a large master planned community in the West and was one of at least eight bidders. The bidders included the major incumbent providers such as major cable operators and RBOCs. After the greenfield developer narrowed the field down to three finalists, the new competitive entrant won the contract. This bidding dynamic is unquestionably pro-competitive and strong evidence that exclusive agreements foster competition in the multichannel video marketplace.

One of the natural consequences of this bidding situation is that consumers reap the benefits of competition. To win greenfield development bids, new competitive entrants must cater to consumer preferences and demands. If they do not, they will not win bids. Thus, potential video providers often create packages and offerings that provide more services with higher quality at lower prices. They tailor their offerings to the greenfield communities they serve and offer benefits, applications, and content not found in other video offerings such as unique community television channels, channels dedicated to local schools, free upgrades and other discounts for schools, a la carte programming, and video-on-demand hosting for educational and community programs. They also offer very competitive pricing and quality, like the 10% price guarantee discussed above. Many new competitive entrants negotiate service quality guaranties with developers and commit to provide uninterrupted high quality service. Developers can also create contractual penalties that provide redress to consumers in the event new competitive entrants are unable to meet all of their commitments. These consumer benefits only exist because the multichannel video marketplace is competitive and exclusive agreements permit innovative small companies to enter. Regulating or limiting exclusive agreements will undermine the advantages consumers are presently enjoying.

The consumer benefits of competitive bidding for exclusive agreements extend beyond the consumers directly served by the video provider to the greater community. Indeed, the presence of a single new entrant in a market, even one that serves a greenfield master planned community constituting a mere fraction of a jurisdiction's total population, produces broad customer benefits with respect to price, quality and service. As the FCC noted, "[t]he record demonstrates that new cable competition reduces rates far more than competition from DBS. Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month."[16]

3. The Greenfield FTTH Model Preserves Consumer Choice.

The greenfield FTTH business model preserves consumer choice with respect to video service providers. Greenfield developments are unique from most other residential situations in that they do not have pre-existing homeowners. This means that everyone that moves to a greenfield development makes the conscious choice to do so. In making this choice, they also make the choice of video service providers. If they do not like the video service provider, they can weigh that factor in their decision whether to move to the greenfield development. The identity of the video service provider is known before people move and can be evaluated before a house is purchased. In this way the selection of a video service provider is not thrust on a customer and consumer choice is preserved.

This is very different from a situation involving an existing homeowner. If a FTTH network is built to an existing homeowner, that existing homeowner does not have the same decision or choice as a person moving to a greenfield development. The homeowner cannot simply move or pick a new neighborhood to have a different service provider. Her choice of where to live has already been made. Because the existing homeowner's choice is limited, she should not be forced to accept only one service provider.

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[16] *Franchising Reform Order* at ¶ 50.

D. Exclusive Agreements Foster Accelerated Broadband Deployment.

Exclusive agreements for video services accelerate broadband deployment because deployment of video service includes deployment of broadband and exclusive agreements allow competitors to deploy video service. Most new competitive entrants bidding on greenfield developments offer "triple play" services of high-speed internet access, voice and video. They use one fiber optic wire to provide all services. Indeed, video service requires the most bandwidth of the three "triple play" services and any competitive new entrant that spends the money to create a video network is almost assuredly going to offer voice and data because the costs of adding the additional services is relatively low. This combination of services is the very definition of the "advanced telecommunications capability" discussed in Section 706: "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality *voice, data, graphics, and video* telecommunications using any technology."[17] The "triple play" is an essential element of the greenfield FTTH business model because it provides multiple revenue streams to help recoup the large upfront capital expenditures required to provide service. Thus, when a new competitive entrant enters the video market due to exclusive agreements it also deploys broadband.

In the context of franchising, the FCC recognized the economic reality of how cable service can promote broadband deployment by noting that "[r]evenues from

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[17] 47 U.S.C. § 706 (emphasis added).

cable services are, in fact, a driver for broadband deployment."[18] In that order, the FCC examined state regulations that inhibit a new entrant's ability to compete in the video services market, increase the potential cost of doing business, and act as a barrier to entry. The FCC recognized that regulatory restrictions imposed on franchise applicants by local franchising authorities "discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadband services, because franchise applicants do not have the promise of revenues from video services to offset the costs of such deployment."[19] It is this "promise of revenues" that is at stake in this proceeding if the FCC imposes restrictions on the ability of greenfield developers to partner with their choice of broadband service providers to deploy advanced services to future residents.

And in another context—unbundling of fiber— the FCC noted that allowing service providers to enjoy the fruits of their investment by giving them exclusive use of their infrastructure can help speed the deployment of new services. In *USTA v. FCC*, the D.C. Circuit found that the FCC was justified in its decision not to require unbundling of fiber stating, "[a]bsence of unbundling . . . will give all parties an incentive to take a shot at this potentially lucrative market."[20] With respect to greenfield fiber deployments in particular, the FCC denied unbundling without

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18 *Franchising Reform Order* at ¶ 13.

19 *Id.* at ¶ 3.

20 *USTA v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004).

qualification, to avoid disturbing market-based economic incentives that could speed the deployment of broadband networks in accordance with Section 706.[21]

Thus, because of FCC forbearance in the unbundling context, incumbents retain exclusivity over their own fiber assets providing a distinct financial incentive to invest in further and wider deployment of advanced fiber optic networks. A similar incentive naturally exists in the video marketplace today, as video service providers freely enter into exclusive contracts with developers for broadband video systems and triple-play network build-outs. These freely negotiated contracts allow new entrants to enjoy the fruits of their investment through an assured revenue stream. The FCC's reasoning in the unbundling context applies to the issues presented in this proceeding. That is, by allowing exclusive contracts which naturally arise in a free and competitive marketplace, the FCC effectively removes a barrier to broadband deployment.

E. The FCC's Authority Over Exclusive Contracts in MDUs and Other Real Estate Developments Extends To Finding That Exclusive Contracts Are Not Anti-Competitive.

In its *Notice of Proposed Rule Making*, the FCC requested comments regarding how courts have interpreted language under the Federal Trade Commission Act ("FTCA") that is analogous to alleged FCC jurisdiction-granting language in Section 628(b). In the FTCA context, courts have ruled that the Federal Trade Commission ("FTC") is correct in deciding that exclusive contracts

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[21] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rule Making, 18 FCC Rcd. 16978 ¶ 275 (2003).

are not, per se, illegal. The FTC has discretion to look at the potential pro-competitive aspects of exclusive contracts and can, in promoting the policies underlying the FTCA, allow exclusive arrangements where such arrangements promote competition. The Supreme Court ruled that the "point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question."[22]

Using this reasoning, the FCC must examine the industry as a whole, and the pro-competitive benefits of allowing exclusive contracts to give new entrants a financial justification for the tremendous outlay of time, resources and capital necessary to build out infrastructure to an entire development. Cases decided under the FTCA inform, by analogy, that exclusivity in and of itself is not a per se "unfair method[] of competition" or an "unfair method or deceptive act[] or practice[]" under Section 628(b). As such, the FCC has full authority and discretion to allow exclusivity in this market to promote greater competition among more players in the provision of video services and the deployment of broadband to unserved areas.

Such a conclusion is further supported when considering exclusive dealings in the anti-trust context.[23] It is well established that exclusive dealings are neither

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[22] *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 396 (1953).

[23] Exclusive dealing arrangements may be challenged under Section 3 of the Clayton Act or Section 1 of the Sherman Act or (if the defendant has substantial market power) Section 2 of the Sherman Act.

per se nor presumptively illegal under anti-trust laws.

The Supreme Court in *Tampa Electric Co. v. Nashville Coal Co.* considered the legality of a twenty-year requirements contract between an electric utility and a coal producer under the Clayton Act.[24] The dollar amount involved in the transaction was substantial, approximately $128 million. However, this amounted to less than one percent of total industry coal production within the coal producer's area of competition. The Court found that "even though a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected."[25] The Court went on to declare that the substantiality of foreclosure will normally require analysis of such market factors as the "relative strength of the parties," the "proportionate volume" of commerce affected by the arrangement relative to the total volume of commerce in the relevant market, and the "probable immediate and future effects" of the agreement on "effective competition" within the market.[26] The Court upheld the contract given its insubstantial impact on the total coal production within the relevant market.[27]

The market-oriented analysis prescribed in *Tampa Electric* reads much like the

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[24] 365 U.S. 320 (1961).

[25] *Id.* at 327.

[26] *Id.* at 329.

[27] *Id.* at 334.

"rule of reason" employed in Sherman Act claims.[28] The rule of reason considers such things as proof of the relevant market, the defendant's degree of market power within the market, the extent of market foreclosure resulting from the arrangement, the impact on competitors, and competitive justifications for use of an exclusive dealing restraint.[29] Recently, the First Circuit aptly recognized that:

> [d]espite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws. Compare *Standard Oil Co. of Cal. v. United States,* 337 U.S. 293, 306-07 (1949) with *Tampa Elec. Co.,* 365 U.S. at 334 and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 45 (1984) (O'Connor, J., concurring). ***Rather, it is widely recognized that in many circumstances they may be highly efficient -- to assure supply, price stability, outlets, investment, best efforts or the like -- and pose no competitive threat at all.*** Ordinarily, such agreements pose a threat to competition only in very discrete circumstances, and much sweat and tears have gone into identifying these criteria.[30]

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[28] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (abrogated on other grounds by *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 126 S.Ct. 1281 (2006)).

[29] *See id.* In *Jefferson Parish*, an anesthesiologist that was excluded from providing anesthesiological services at the hospital as a result of an exclusive dealings contract between the hospital and a firm of anesthesiologists lodged a Sherman Act challenge. The lower court found that the limited anticompetitive effect of the arrangement was offset by the hospital's countervailing interests in efficient and effective health care. The Supreme Court agreed on different grounds.

[30] *Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass'n., Inc.,* 357 F.3d 1, 8 (1st Cir. 2004) (emphasis added) (citation omitted); *see* Holmes, ANTITRUST LAW HANDBOOK §5.5, (Nov. 2006), n. 7 citing *PepsiCo, Inc. v. Coca-Cola Co.,* 315 F.3d 101 (2d Cir. 2002) (plaintiff failed to raise a triable jury issue that the rule of reason was violated by loyalty clauses in Coca-Cola's distributor agreements prohibiting its distributors from carrying competing fountain syrups, where it was undisputed that the plaintiff was still able to find distributors for its products, the challenged agreements affected less than 20% of all distributors in the industry and were "short in duration" and "terminable at will," and the plaintiff failed to otherwise demonstrate "any significant anticompetitive effect on the price or output of fountain syrups"); *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.,* 300 F.3d 620, 626 (5th Cir. 2002) (affirming dismissal of a complaint as "[the plaintiff] must demonstrate that the 'complained-of actions unreasonably restrained trade. The court must then balance the 'anticompetitive evils of a restrictive practice ... against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recover under the rule of reason.'") (citation omitted); *Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848 (9th Cir. 1995) (exclusive dealing claim failed where the defendant had

As discussed above, new competitive entrants lack market power and market share. Unlike incumbent providers, they do not possess enough market power to effectuate any restraint on trade. Thus, at least for new competitive entrants, the FCC should not prohibit or otherwise limit exclusive agreements. The valid business reasons that justify the use of exclusive contracts, and the consumer benefits and fostering of competition that result from the exclusive contracts support a finding that the exclusive dealings are anything but anti-competitive.

F. Prohibiting or Regulating Exclusive Contracts Will Adversely Affect the Rights of Real Property Owners.

Although the GSPC consists of FTTH video service providers, the GSPC briefly notes that prohibiting exclusive contracts will infringe upon the rights of property owners. Specifically, any FCC action regulating exclusive agreements will limit the rights of greenfield developers to determine what amenities will be available on their properties. It will also restrict their freedom to carefully select the most suitable and attractive voice, video and data service technologies and service options through a competitive bidding process. Accordingly, to avoid infringing upon the rights of property owners, the FCC should refrain from regulating exclusive contracts in greenfield communities.

III. CONCLUSION

The FCC should not stand in the way of next generation service providers that promote competition and want to build out advanced technology

valid business reasons for using an exclusivity contract with a distributor that had formerly carried products for the plaintiff).

infrastructures for state-of-the-art video, voice and data services. The FCC should not, through regulation, prohibit video service providers that have the means and the desire to build out in a new area and have reached mutually beneficial agreements with developers that will also benefit future residents by ensuring that they have access to voice, video and data transmission from conducting business. If the FCC prohibits exclusive agreements it will suppress competition rather than foster it. Rather, the FCC should rely on the marketplace, to the maximum extent possible, to support new competitors in the deployment of video services and broadband. Accordingly, the FCC should forebear from regulating exclusive agreements in MDUs and other real estate developments.

Respectfully submitted,

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EXHIBIT A

Headend and Central Office Building

Installation of satellite dish at Central Office